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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 795

PERPETUAL ROYALTY CORPORATION;
UNITED ROYALTY CORPORATION;
ABERDEEN OIL COMPANY, INC.,
Petitioners

V.

SARAH KIPFER AND WARD A. McGINNIS,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners, Perpetual Royalty Corporation; United Royalty Corporation and Aberdeen Oil Company, Inc., pray that a writ certiorari issue to review the judgment of the United States Court of Appeals for the Tenth District, entered in the above-entitled case on May 11, 1966.

CITATIONS TO OPINIONS BELOW

The Memorandum of Opinion of the District Court (R. 28-38)[1], printed in Appendix hereto, infra, p. 11, is reported in 253 F. Supp. 571. The opinion of the Circuit Court of Appeals, printed in Appendix hereto, infra, p. 51, is reported in 361 F. 2d 317.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May, 1966. TR. 4; p. 51, infra. Rehearing was denied on June 27, 1966. TR. 6. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether an undivided mineral interest in Kansas Realty in the possession of the record and legal owners may be divested by a third party under the equitable doctrine of laches.

STATEMENT

This action was instituted by Petitioners[2] on February 6, 1964, in the United States District Court for the Disrict of Kansas, jurisdiction of said court having been invoked because of diversity

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1. Citation to the reproduced transcript of the record in the court below is designated by the symbol "R." The symbol "TR" is used to designate the typed transcript of the court below as certified October 11, 1966 by the clerk of said court and which adopts by reference the earlier reproduced transcript of the record.
2. During the course of this litigation, Petitioners were palintiffs and appellants in the trial and appellate courts, respectively, but for purposes of simplicity are referred to as "Petitioners" herein. Counter-designation of "Respondents," defendants and appellees, respectively, in the same courts is also made.

of citizenship as between all parties plaintiff and all parties defendant. (R. 3-4.). In their complaint, Petitioners alleged ownership of legal title, under conveyances of record, to certain undivided mineral interests underlying a section of land in Greenwood county, Kansas; sought to quiet their title therein and prayed for an accounting of oil and/or gas royalties derived from said property over a preceding eight-year period in the approximate sum of $800,000[3]. (R. 3-9.).

Following several preliminary motions (R. 9-14.) the respective parties entered into a Stipulation of Facts (R. 16-26); a supplemental Stipulation of Facts (R. 26-28); waived trial and consented to determination of the case by the court on the facts as stipulated, as reflected by the pre-trial order. (R. 14.).

The Stipulation of Facts, as supplemented, reflects an acknowledgment by all parties litigant that prior to the year 1946 the minerals underlying the subject realty were held in co-tenancy by their respective predecessors in title.[4] It further appears that royalty proceeds from oil and/or gas produced from said section of land were apportioned among said co-tenants during the original production period beginning in 1921 and ending in 1934. In 1934 the wells on said section of land ceased to produce, were

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3. Under the Stipulation of Facts (See R. 24) the lease existing on the subject realty has produced oil to the approximate value of $852,00 up to December 31, 1963, no portion of which has been paid to Petitioners. One-half of all subsequent runs are being held in a suspense account, pending outcome of this litigation. (R. 34.).

4. There arose during this litigation a dispute over the fractional division of such ownership which remains unresolved because of the nature of the ruling of the trial court. (R. 14.).

abandoned and thereafter the minerals under said land remained in a dormant state until 1956 when the current oil and gas production was obtained.

The Stipulation of Facts, as supplemented, further reflects that in 1946 the husband and immediate predecessor in title of Respondent Sarah Kipfer acquired the interest theretofore held under his chain of ownership and shortly thereafter initiated a quiet title proceeding in the State District Court of Greenwood County, Kansas. Among the numerous parties defendant joined in said action were Petitioner United Royalty Corporation and the predecessors in title of Petitioners Perpetual Royalty Corporation and Aberdeen Oil Company, Inc. The petition filed in said action contained general averments of fee ownership of the section of land in question and asserted exclusive adverse possession of said property by plaintiff and his predecessors in title over a period of time exceeding 15 years.[5] No deraignment of title was had showing what superiority of claim to the mineral interests of Petitioners and/or their predetessors in title the plaintiff possessed. In this connection, the instrument of record under which said plaintiff acquired his interest in said section of land specifically excepted the mineral interests previously severed and conveyed to the predecessors in title of Petitioners.

Following constructive service upon Petitioners and/or their predecessors in title under the publication statutes of Kansas then

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5. Under Kansas G. S. 60-304 the limitation actions for recovery of real property adversely possessed is 15 yrs.

in force and effect,[6] default judgment was entered in favor of the plaintiff in said state court proceeding, purportedly divesting Petitioners and/or their predecessors in title of any interest in the said section of land.

Briefly stated, the remaining portion of said factual stipulation reflects that following the acquisition of her interest in the section of land in question, Respondent Sarah Kipfer executed a succession of oil and gas leases including that present lease now held by the Respondent Ward A. McGinnis and under which oil and gas production was obtained in 1956. Subsequent to 1956 two fractional interests in a portion of the minerals underlying said section of land were conveyed by Respondent Sarah Kipfer to third parties.

In the trial court below Petitioners attacked the validity of the 1946 state court proceeding upon a number of grounds, including the constitutionality of the publication statutes under which consructive service was allegedly had, and asserted their record ownership of an undivided interest in the minerals underlying said section of land.

Upon submission of this case for decision under the Stipulation of Facts, as supplemented, the trial court issued its memorandum of opinion (R. 28.) in which, after noting the points of law raised by the respective parties, it elected to deal with the issues in inverse order:

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6. Kansas, G. S. 60-2525 et seq.

> "We shall deal with the laches question first, thus avoiding for the moment the possible constitutional issues. *For the purposes of considering the laches issue, it will be assumed, without so holding, that the 1946 quiet title decree is void for one reason or another.*"[7] (R. 32.).

Applying the substantive law of the State of Kansas, the trial court then found that the claim of Petitioners was barred by the equitable doctrine of laches and ordered judgment to be entered accordingly. (R. 38.).

The court below, by per curium opinion, affirmed the decision of the trial court upon appeal. (TR. 3.).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case is in direct conflict with the decisions of the Supreme Court of Kansas and the Fifth Circuit Court of Appeals on the question herein presented.

The high state court of Kansas, in the case of *Harris v. Defenbaugh,* 82 Kan. 765, 109 P. 681 (Appendix B, infra, pp. 41-50) held that the owner of realty is not obligated to take it into his actual possession, but may use it as he deems best, and that

> " . . . if it suit his purposes better to leave it unoccupied and vacant, he can do so without danger thereby of losing his title, unless some person obtains possession and retains it adversely for a length of time sufficient to bar the owner's rights."

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7 Emphasis supplied.

In support of its interpretation of the substantive law of the state of Kansas on this point, the *Harris* decision notes the accord of the law of the state of Texas and cites as authority the case of *Higgins Oil & Fuel Co. v. Snow,* 113 F. 433, 51 C.C.A. 267 (Appendix B, infra, pp. 25-40) which states at page 437:

> "The first question presented has been frequently decided by the Supreme Court of Texas, where it is held that, if complaintant's title is a legal one, capable of being established at law, the doctrine of laches and stale claim does not apply. It is simply a qeustion of adverse possession."

The Court below in this case, by assuming lack of title of respondents to the mineral interests in question, either under legal proceeding or through adverse possession, yet holding the same to be immaterial because of bar by laches of petitioners' claim (R. 32; 37), has divested legal title through equitable means in contravention of the above decisions on the same question and under the identical law.

2. The question herein presented is of paramount importance to the citizens of Kansas for the decision of the court below, if allowed to stand, may encourage and promote endless litigation over mineral ownership within the state. In a state with considerable quantities of oil and gas production and great fields in reserve, the ruling of the lower court, which would allow those out of possession and without even color of title to land to prevail over record owners, is particularly untenable. This is especially true when one considers that ownership of such minerals is quite often by cotenancy and with severance from the surface interests.

Prior to decision rendered below a record owner of such interest was protected by the inability of third parties to possess, adversely, the severed minerals without developing and producing the same.[8] Thus notice of adverse claim by surface activity could be reasonably expected to occur long before the running of any prescriptive period and an owner might take steps to protect his interest. Under the decision of the lower court herein such protection is no longer afforded, for a co-tenant, with full executive rights as to his undivided interest, may acquire the entire mineral interest by developing, or even leasing, the minerals.

No longer may a co-tenant presume that his interest is protected until actual ouster by his counterpart, and notice of such, has occurred.[9] Neither may he assume that a co-tenant who executes a standard printed lease has merely leased his own interest and relies upon the entirety clause to protect everyone concerned should his mathematical computation of small fractional interests prove erroneous.

Under the ruling of the court below not only is the validity of record ownership of mineral interests within the state of Kansas now subject to vexatious litigation, but the record owner of severed mineral interests, particularly the absentee owner, is faced with an impossible task of protecting his interest.

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8. Noble v. Kahn, 206 Okl. 13, 240 P. 2d 757, 35 A.L.R. 2d 119; J. R. Crowe Coal and Mining Co. v. Atkinson, 85 Kan. 357, 116 P. 499.

9. Ludley v. Pure Oil Co., 11 P. 2d 102; Summer v. Vinson, 211 Ky. 571, 277 S.W. 849.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

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Memorandum Of Opinion

This suit was commenced by plaintiffs to quiet title against defendants in certain properties in Greenwood County, Kansas and for an accounting. On March 4, 1964, defendant Cities Service filed a motion to dismiss for lack of diversity jurisdiction as to it, and on March 19, 1964 plaintiffs voluntarily dismissed without prejudice as against Cities. On March 12, 1964 defendants McGinnis and Kipfer filed separate motions for summary judgment. On June 19, 1964 the parties were granted time in which to submit a stipulation of facts for the determination of the issues involved.

The parties filed a stipulation of facts on November 6, 1964 and also filed a Pre-trial Order on the same date. As we read the

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Pre-trial Order, the summary judgment motion has been abandoned and the parties have now waived a trial and consented to the court's determining the case on the stipulated facts. A supplement to the stipulated facts was filed January 27, 1965 and the final briefs were filed March 12, 1965.

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One of the issues listed in the Pre-Trial Order was whether plaintiffs were precluded from prosecuting this suit under Kan. Stat. Ann. 1965, 60-502. This section of the new Kansas civil code was invalidated by the state state supreme court in Great Lakes Pipeline Co. v. Wetschensky, 193 Kan. 706, 396 P. 2d 295 (1964), and thus the issue is removed from the case at bar.

Most of the contentions of this lawsuit either center around

or are related to a quiet title suit and decree brought by one Fred C. Kipfer in 1946. Copies of all proceedings in that 1946 Greenwood County, Kansas suit are attached to the stipulation of facts herein. Defendant Sarah Kipfer is the widow of Fred C. Kipfer, and defendant Ward McGinnis is lessee of the land involved and has been producing oil from the land since 1956.

Defendants to the 1946 quiet title action were numerous and included plaintiff United Royalty Corporation [United] and the predecessors of plaintiffs Perpetual Royalty Corporation [Perpetual] and Aberdeen Oil Company, Inc. [Aberdeen]

Plaintiffs' claims and contentions will be briefly summarized from the stipulated facts. We add that the stipulation of facts and supplement thereto are incorporated herein by reference as our findings of fact.

Plaintiffs claim mineral interests in Section 6, Township 24 S, Range 11 E, Greenwood County as follows:

United claims an undivided one-fourth interest in and under the Northwest Quarter of Section 6.

Aberdeen claims an undivided one-fourth interest in and under the Southwest Quarter of Section 6.

Perpetual claims an undivided three-sixteenths interest in and under the West half of Section 6; and undivided three-sixteenths interest in and under the Northeast Quarter of Section 6; and undivided one-half interest in and under the Southeast quarter of Section 6.

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The chains of title under which plaintiffs claim may be briefly summarized thus:

(a) United: United claims under a conveyance to it from

the O. K. Herndon Royalty Company in 1926 by mineral deed. Its predecessors include E. E. Parkin and wife; Grant Jeffers; and O. K. Herndon. United was a named defendant in the 1946 quiet title action, as were its predecessors.

(b) Aberdeen claims under conveyance from Monarch Royalty Corporation and correction conveyance from Monarch Royalty Corporation and Monarch Royalty Corporation of Kansas, both dated in 1959, some three years after defendant McGinnis commenced current production on the land. Aberdeen's predecessors include E. E. Parkin and wife; Grant Jeffers and O. K. Herndon, Trustee; O. K. Herndon Royalty Company; and Royalty Products Company. All of Aberdeen's predecessors were named defendants to the 1946 quiet title suit. Aberdeen took by quitclaim conveyance from Monarch and Monarch of Kansas without any warranties of title. It should be added that plaintiffs on page 9 of their Reply Brief state "Monarch Royalty Corporation of Kansas was a Kansas Corporation." But the Stipulation of Facts, paragraph 11, page 8, states "Monarch Royalty Corporation of Kansas, a corporation organized under the laws of the State of Delaware, was authorized to do business in the State of Kansas on August 25, 1930 and withdrew from the State of Kansas on April 26, 1952." As we read the stipulated facts, Monarch of Kansas was a Delaware corporation, not a Kansas corporation as alleged in plaintiffs' Reply Brief.

(c) Perpetual: Perpetual claims under conveyances from Paul Fleeger and Evelyn Grisso [sole heirs of D. P. and Lillie Fleeger, deceases] in 1963, and from Florence I. Bitler in 1964 — seven and eight years respectively after defendant McGinnis commenced current production on the land. The 1963 conveyance to

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plaintiff Perpetual from Paul Fleeger and Evelyn Grisso was by quitclaim conveyance. The 1964 conveyance from Florence I.

Bitler to plaintiff Perpetual was likewise by quitclaim. Perpetual also claims under a 1962 conveyance from Perpetual Royalty Corporation, a Delaware corporation. It should be pointed out that plaintiff Perpetual is an Oklahoma corporation. The Delaware corporation which conveyed to plaintiff Perpetual in 1962 acquired its interest in 1953 from W. H. Rechtern. The 1953 conveyance was by mineral deed with warranty of title; the 1962 conveyance from Perpetual, a Delaware corporation to plaintiff Perpetual, an Oklahoma corporation was by quitclaim deed.

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Perpetual's predecessors include E. E. Parkin and wife; C. P. Van Graafeiland, Trustee; A. J. Schleuter, Wm. H. Rechtern; D. P. Fleeger; Lillie Fleeger; and Florence I. Bitler. All of Perpetual's predecessors who claimed some interest prior to 1946 were named defendants to the 1946 quiet title suit. Florence I. Bitler was named therein as florence E. Bitler and this is the subject of some controversy at bar.

In 1953, Rechtern conveyed to Perpetual Royalty Corporation (a Delaware corporation) who conveyed to Perpetual Royalty Corporation (an Oklahoma corporation and plaintiff herein) in 1962. Perpetual also took a conveyance in 1922 from Van Graafeiland and in turn conveyed to Schleuter in 1940.

In summary, plaintiff United's claim to title predates the 1946 quiet title suit and United was a named defendant therein; plaintiff Aberdeen acquired its claim by quitclaim some 13 years after the 1946 quiet title suit and some three years after defendants commenced the current production on the land. Plaintiff Perpetual (the Oklahoma corporation) was of record at one

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time prior to 1946, but divested itself prior to 1946.

Plaintiff acquired its claim by quitclaim some 16 to 18

years after the 1946 quiet title suit and some 6 to 8 years after defendants commenced current production on the land. It is stipulated that defendant Kipfer and her predecessors have been in possession of Section 6 and have been claiming a full fee title including title to all of the minerals since 1946. Perpetual, the Delaware corporation is not a party to this suit; it is a separate entity and for our purposes we consider plaintiff Perpetual's present claims to have been acquired by quitclaim in 1962 to 1964.

Plaintiffs have the burden of establishing their claims to title on the basis of the stipulated facts. Plaintiffs contentions may be summarized thus:

(a) That a mineral deed from W. H. Freeman, the original owner of the land, to E. E. Parkin in 1921 conveyed an undivided one-half interest in the oil, gas and other minerals in and under said land. Defendants contend it conveyed only an undivided one-sixteenth interest. As we understand this contention, it will become important only in the event plaintiffs are successful in quieting title.

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(b) That the decree in the 1946 quiet title suit in so far as it purports to quiet title to the interests in oil, gas and minerals now claimed by them is a nullity and may now be collaterally attacked because notice in the suit was by publication only (in the Madison, Kansas News, an authorized newspaper). Plaintiffs contend this publication notice does not meet the due process requirements of the Fourteenth Amendment.

(c) That the 1946 quiet titled decree insofar as it relates to the oil, gas and minerals now claimed by plaintiffs is void because it was rendered by default on a petition which on its face was insufficient to divest a paramount title.

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(d) That the statute of limitations was not set in motion in 1946 and was not set in motion prior to 1956.

(e) That leases executed to Eisenhour in 1953 and to Morris in 7954 and the drilling of a dry hole by Eisenhour do not establish title in defendant by adverste possession.

(f) That Kan. G. S. 1949, 60-3133 does not apply to a judgment that is a nullity or which violates due process.

(g) That their claims are not barred by laches.

We shall deal with the laches question first, thus avoiding for the moment possible constitutional issues. For the purpose of considering the laches issue, it will be assumed, without so holding, that the 1946 quiet title decree is void for one reason or another.

It is generally considered that where, as in Kansas, mineral interests create interests in realty, such mineral interests cannot be lost through mere abandonment. The equitable doctrine of laches, however, acting as a form of estoppel, can preclude a plaintiff from asserting in equity an alleged legal claim or interest under given factual patterns. A factual background of what plaintiffs and their predecessors have or have not done is therefore essential. Accordingly, a brief outline of stipulated facts pertaining to the laches issue will be given, of which plaintiffs and their appropriate predecessors would have had at least constructive notice.

No oil or gas was produced from the land involved from 1934 until may of 1956 when defendant McGinnis brought in his first well.

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Neither plaintiffs nor any of their predecessors in title have ever

executed an oil and gas lease on the land or drilled any oil and gas wells thereon or produced any oil or gas therefrom except the production obtained under the Parkin lease, which leasehold and wells were abandoned in 1934.

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Fred C. Kipfer and his successors (including defendant Sarah Kipfer) have been in continuous possession of the land involved since February 28, 1946 and have claimed to own said land in fee simple from that date, including all the oil, gas and other minerals therein. In 1953 Fred Kipfer and his wife Sarah (defendant herein) executed an oil and gas lease to H. C. Eisenhour purporting to cover all of Section 6. A dry hole was drilled and the lease expired by its own terms.

In 1954 Fred Kipfer and his wife Sarah (defendant herein) executed an oil and gas lease to F. E. Morris purporting to cover all of the section here involved. No wells were drilled and the lease apparently expired by its own terms on or about April 1, 1955.

Fred Kipfer died intestate in 1954 and left his wife Sarah and a daughter Louise as his heirs at law. His estate was probated in Greenwood County, Kansas and the final decree of distribution was entered in 1955 finding that Fred Kipfer died owning all of Section 6 here involved. Defendant Sarah Kipfer filed a partition suit against Louise Kipfer in 1955 in the Greenwood County District Court. The court ordered that all of Section 6 here involved be set aside to defendant Sarah Kipfer.

Plaintiffs contend that Sarah Kipfer cannot own more than an undivided one-half interest in the minerals under the land in question; yet in 1956 and 1957 Sarah Kipfer conveyed fractional shares of the minerals to Arthur Lyke and B. W. Crone. The total fractional share so conveyed by Sarah Kipfer to Lyke and Crone exceeds one-half of the minerals as to the Northwest, Northeast and Southwest quarters of said Section 6. The Stipu-

lation of Facts, paragraph 17, lists the Lyke conveyance as having been made in 1946, but a study of the conveyance itself [Exhibit GG] shows it was made in 1956. In the Lyke conveyance, defend-

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ant Sarah warranted that she was lawfully seized of a fee simple absolute in and to all of Section 6 and warranted the title to be free from all former grante and the like except an oil and gas lease.

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Sarah Kipfer executed an oil and gas lease to defendant Ward McGinnis in 1955 purporting to cover all of Section 6 here involved. This lease, as well as the earlier leases and conveyances made by Sarah Kipfer, was duly recorded. In 1956, McGinnis as lessee completed a producing well and recorded an affidavit of production. Since that time, McGinnis has completed a total of ten producing wells on the land — six on the Southwest quarter; three on the Northwest quarter; and one on the Southeast quarter. The Northeast quarter has no producing wells. McGinnis has at all times operated Section 6 as an entity with only one tank battery for the entire section.

Cities Service Oil Company has been and is purchasing the oil runs from the McGinnis lease and has paid the proceeds therefrom seven-eights to McGinnis as lessee and one-eighth to Sarah Kipfer and her assigns (Lyke and Crone); Cities is now retaining one-half the proceeds in a suspense account pending the outcome of this litigation. From 1956 to the end of 1963, the McGinnis lease has produced oil of an approximate value of $852,000.00. No proceeds from oil runs have been paid to plaintiffs.

We have then, a case in which Sarah Kipfer and her predecessors have possessed Section 6 and claimed fee title — in-

cluding the mineral estate now being asserted by plaintiffs — for some 17 or 18 years prior to the filing of this suit. Plaintiffs claim an undivided mineral interest in the land, which would give them the right to develop the land for oil and gas production. Neither

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plaintiffs nor any of their predecessors have done so since 1934. Plaintiff United waited for some 8 years after the current production and profit commenced before asserting its claim. Plaintiffs Perpetual and Aberdeen did not acquire their alleged interests in the minerals until from 3 to 8 years after current production and profits commenced. Their interests were acquired by quitclaim and they acquired in the bargain any burdens of laches applicable to their predecessors as well as benefits of claimed interests. Nowhere in the briefs of plaintiffs do we find even an attempted excuse for the delay between the advent of the admittedly adverse claim to the minerals made by Sarah Kipfer and her predecessor and the filing of this suit. ("Adverse claim" is not here used as a term of art; it merely indicates that since 1946, Sarah Kipfer and her predecessor have claimed title to all the mineral interests in the land involved.)

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Plaintiffs strongly urge that mere passage of time is not enough to invoke the doctrine of laches and contend that some prejudice to defendants must be shown by such delay. But it is stipulated that since 1946, the Kipfers have acted under the assumption and conviction that they held full title to Section 6 — including title to all mineral interests therein. In reliance on this conviction, three leases covering all of Section 6 were executed; fractional shares of minerals in excess of what plaintiffs claim defendant owns were conveyed — and in the mineral conveyance to Lyke in 1956, Sarah Kipfer warranted she had full

fee title in and to all of Section 6. Further, in reliance on this conviction, McGinnis has operated the section as an entity with only one tank battery, seriously impairing if not precluding the apportionment of production among severed mineral estates to the various quarters of the section should that become necessary.

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During all this time, neither plaintiffs nor their predecessors took any affirmative step to give defendants any indication that their claims of ownership were not correct or were challenged. Plaintiffs and their predecessors remained totally and completely passive until some eight years after current production commenced and showed the value of the property before they gave any indication that defendant Sarah Kipfer's mineral estate ownership was other than she and her husband had contended since 1946. Further, it must be assumed that the Kipfers have paid taxes on the entire section, and have done many other things during all of the years in which plaintiffs and their predecessors have been content to sleep on their alleged rights.

In short, the record discloses no excuse for the long delay between defendant's assertion of ownership and acts in reliance thereon and plaintiffs' current assertion of rights in the minerals. Plaintiffs have lacked of diligence in electing to call on a court of equity to enforce their alleged claims.

There can be no doubt that plaintiffs are seeking equitable relief at bar. It is also clear that laches is an equity device to bar bare legal claims in certain instances. We feel the following language to be apposite to the case at bar:

"Courts of equity will regard long passage of time in asserting claims with disfavor apart from any particular statute of limitations. The doctrine of laches is designed to bar stale claims. The plaintiff argues that mere passage of time is not

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enough to invoke the doctrine. It may be readily assumed that defendant has paid taxes on the real estate, . . . and done many other things during all of the years in which plaintiff and the other heirs . . . have been content to sleep on their alleged rights. Nowhere in the amended petition do we find even an attempted excuse for the delay of thirteen years between the death of the mother and the beginning of this lawsuit." Degenhardt v. Degenhart, 183 Kan. 260, 267, 326 P. 2d 288 (1958).

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Further, it has been recognized that while mere lapse of time may ordinarily be insufficient to make laches applicable, "it has been held sufficient to make the doctrine applicable in cases where it would be clearly inequitable to permit the enforcement of bare legal rights." McKee v. McKee, 154 Kan. 340, 343, 18 P. 2d 544 (1941).

We need no citation of authorities to state that what constitutes reasonable time within which a plainiff must assert his claim depends on the facts and circumstances of a given case. Ordinarily, some action should be taken with reasonable promptness after the facts become easily ascertainable to a plaintiff, provided the delay works a disadvantage to others. See Pratt v. Shell Petroleum Corporation, 100 F. 2d 833 (10th Cir. 1938). And courts of equity are not bound by statutes of limitations, but may determine a given case according to equities which condition it. See Shell v. Strong, 151 F. 2d 909 (10th Cir. 1945).

Additionally, the doctrine of laches is peculiarly appropriate to oil and gas and mineral interests which are subject to relatively rapid deviations in value. The Kansas Supreme Court has said:

"The doctrine that a person claiming an interest or a right may be required to assert it promptly is especially applicable to oil and gas properties which are subject to rapid fluctuation in

value. That [a claimant] will not be permitted to engage in speculative delay until the value of such property has greatly appreciated, definitely established." Malone v. Young, 148 Kan. 250, 262, 81 P. 2d 23 (1938).

In the case at bar plaintiffs and their predecessors made no attempt to develop the interest they presently claim from 1934 forward. And they remained utterly passive for some eight years while defendants were expending money, efforts and enterprise in developing the land for oil. Plaintiffs and their predecessors remained

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silent during some eight years while Cities Service paid oil run proceeds to defendants and their assigns on a seven-eights/

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one-eighth basis. Plaintiffs and their predecessors asserted no rights in or to the minerals during this time period. We feel that under such circumstances Malone is applicable, and that it would be patently inequitable to entertain plaintiffs' claims after such prejudicial inaction on their part and on the part of their predecessors.

In Starkweather v. Jenner, 216 U.S. 524, 530-31, 54 L.ed 602, 605 (1910), the Court indicated under the facts there present that a delay of four years during which there had been a large appreciation in value of the property was an unreasonable delay.

The conclusion is inescapable that plaintiffs and their predecessors stood silently by from 1946 when the Kipfers began claiming all the mineral interests in the land until 1964 when this suit was filed. The stipulated facts further show that plaintiffs and their predecessors remained silent for eight years while defendants expended time, energy and money drilling producing

wells, and took no action while during that time some $852,000 worth of oil was being taken from "their land". Plaintiffs do not contend that they did not know about the drilling of the producers in 1956. Plaintiffs and their predecessors could have asserted their claimed mineral hinterests in 1946 when the Kipfers first commenced claiming full ownership of the minerals; and they could have asserted their alleged claims in 1953 and 1954 when Eisenhour was drilling on the land what turned out to be a dry hole. And they could have asserted their claim in 1956 when defendants brought in a producer. Evidently plaintiffs and their predecessors felt content to say nothing while defendants expended money and effort attempting to develop the land. After the land proved to be valuable for oil, plaintiffs brought this action to quiet title and for an accounting.

In our opinion to permit plaintiffs to assert their alleged

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claims after they and their predecessors were silent and inactive so long would be inequitable and unjust. They have not been possessed of that diligence which equity requires under such circumstances. Cf. Maune v. Landowners Oil Association, 170 Kan. 18, 223 P. 2d 1001 (1950).

Since we conclude that plaintiffs are barred by laches from asserting their claims, we do notr each the potential due process and constitutional issues presented by this case, nor do we reach the other issues listed in the Pre-Trial Order.

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The relief sought by plaintiffs is denied. The foregoing memorandum embodies the facts as stipulated and our conclusions of law, pursuant to Fed. R. Civ. P. 52(a), believed by the court to be necessary.

Prevailing counsel shall prepare, circulate and submit an appropriate order.

At Wichita, Kansas this 10th day of June, 1965.

Wesley E. Brown

United States District Judge

Filed June 11, 1965.

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Journal Entry Of Judgment

On this 10th day of June, 1965, the court, after considering the Pre-trial Order, the stipulation of facts filed by the parties and the briefs of the parties filed herein, finds that judgment should be entered for the defendants in accordance with the Memorandum of Opinion by the court of even date herewith.

It Is By The Court Considered, Ordered, Judged And Decreed that defendants have and recover judgment against plaintiffs including judgment for costs herein.

Wesley E. Brown, Judge

Approved: Hyde, Freeman & Hyde-A. K. Little; Dale B. Stinson, Jr., Attorneys for Plaintiffs By A. K. Little. Carl C. Chase; Lilleston, Spradling, Gott, Stallwitz & Hope, Attorneys for Defendant, Sarah Kipfer By George C. Spradling. E. E. Pedroja; Foulston, Hook and Gerety, Attorneys for Defendant, Ward A. McGinnis By Enos E. Hook.

Filed July 13, 1965.

APPENDIX B

HIGGINS OIL & FUEL CO. et al. v. SNOW et al.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1902.)

No. 1,114.

1. FEDERAL COURTS — FOLLOWING DECISIONS OF STATE COURTS — LIMITATION AND LACHES.

A federal court, although sitting in equity, may follow the rule of decision of the state courts upon the questions of limitation and laches.[1]

2. EQUITY — LACHES — SUIT BASED ON LEGAL TITLE.

Under the rule of decision in Texas, where the title of a complainant to lands, upon which he bases his right to relief in equity, is a legal one, capable of being established at law, the doctrine of laches and stale claim does not apply, but his rights are barred only by adverse possession; and on general principles equity will follow the law on such question, where the jurisdiction is concurrent.

3. JUDGMENTS — PERSONS CONCLUDED — PARTY BY REPRESENTATION.

A widow entitled under the laws of Texas to a life estate in one-third of real estate owned by her husband, which consisted of an undivided interest inherited from his father, is not bound by a compromise judgment entered in an action brought by her children and the other heirs of their grandfather against an adverse claimant, to which action she was not a party. The fact that her co-tenants might have recovered her interest in their own names did not render her a party by representation.

4. ESTOPPEL — LIFE TENANT — ACCEPTANCE OF PROCEEDS OF SALE BY REMAINDER-MEN.

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[1] State laws as rules of decision in federal courts, see notes to Griffin v. Shell Co., 9 C. C. A. 548; Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, C. C. A. 553.

The acceptance by a married woman, as a gift from her children by a former marriage, of a part of the money received by them in payment for their interest in lands inherited from their father, in which she had a life estate under the laws of Texas, did not estop her from asserting her rights as life tenant as against the purchaser, where her children did not undertake to convey anything more than their own interest.

5. DOWER — ESTATE OF SURVIVING WIFE UNDER TEXAS STATUTE — MINERAL RIGHTS.

The land and marital laws of Texas are derived largely from the civil law, and the life estate given thereby to a surviving wife in the lands of her deceased husband in broader than the common-law dower; such life estate being one which under the civil law could not have been impeached for waste, and which would have carried with it the right to open and work every kind of mines on the property.

6. SAME.

The statute of Texas governing "descent and distribution," after providing for the distribution of the personal estate of an intestate who leaves a surviving husband or wife and children, further provides (Rev. St. art. 1689) that "the surviving husband or wife shall also be entitled to an estate for life in one-third of the land of the intestate, with remainder to the child or children of the intestate or their descendants." *Held*, that the word "land" is employed in such statute in its most comprehensive sense, and that a surviving husband or wife takes a one-third interest for life in the land itself, as such, including not only the surface but also all minerals therein, and is entitled to a proportionate share of the income or profit derived from the extraction of such minerals during his or her lifetime, whether operations were commenced prior to the death of the decedent, or subsequently by the remainder-men or owners of the other undivided interests.[2]

[2] Dower in mines, see note to Black v. Mining Co., 3 C.C.A. 316.

7. RECEIVERS — GROUNDS FOR APPOINTMENT — IMPOUNDING INTEREST IN OIL PRODUCTION.

Complainant's husband died intestate, leaving her and two children surviving, and being the owner at the time of his death of an undivided one-sixth interest in certain lands in Texas, in one-third of which, under the laws of the state, complainant took a life estate. No division of the lands affecting complainant's interest was ever made. Subsequently defendants acquired the interests of all of the other tenants in common of the property, including the interest of complainant's children as remainder-men, and drilled numerous oil wells thereon which produced large quantities of oil. *Held*, that complainant was entitled either to one-eighteenth of the net proceeds of the oil produced, or to the income which such share would produce during her lifetime, and that, while she was not entitled to the appointment of a general receiver to take control and management of the property, she was entitled to the appointment of a special receiver to collect and hold such share of the proceeds pending the determination of her rights therein; the defendants being numerous, and for the most part corporations formed for the sole purpose of producing and selling oil.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

The opinion of the circut court, filed December 6, 1901, is in full as follows:

BRYANT, District Judge. This is an application for the appointment of a receiver. The complainant(Annie E. Snow, a citizen of the state of California, joined pro forma by her husband, G. H. Snow, has filed a bill in equity against the defendants, Higgins Oil & Fuel Company and over 200 others, corporations and natural persons, citizens of the state of Texas, or of states other than California, alleging that she is the owner of a life estate in one-eighteenth, undivided, of the John A. Veatch survey

of land in Jefferson county, Tex., less certain subdivisions that are excepted, embracing the greater portion of the Beaumont oil field, and including at the date of the filing of the bill 66 flowing wells, all in the possession of the defendants, who are engaged in marketing the oil. She seeks an accounting in regard to the oil taken and marketed, claiming an eighteenth thereof, and to recover the amount ascertained to be due. The bill also contains the prayer for the appointment of a receiver to take charge of the wells, so that they may be operated pending the litigation without risk or detriment to any party, or, in the alternative, that a reciever be appointed to collect one-eighteenth of the revenues from said wells, and to hold or invest the same pending the litigation, with such powers and duties as the exigencies of the case may warrant. Those of the defendants who have appeared in response to the rule to show cause why a receiver should not be appointed have filed demurrers and answers, and make substantially the following contentions: (1) That the complainant has been guilty of laches in not sooner asserting her claim, and should, therefore, be denied equitable relief; (2) that as to 500 acres of the land she is concluded by a judgment rendered in 1887 in a suit brought by her children and others, in which the 500 acres was awarded to one Charles L. Cleveland, a defendant in the suit; (3) that she received and used money from the estate of her first husband, Andrew A. Veatch, through whom she inherited the life estate here involved, equivalent to her interest in this land, and also received and used a portion of the proceeds of a sale made by her children of their interest, and is therefore estopped from asserting any claim here: (4) that as a life tenant the complainant is entitled to no interest in the oil produced, her estate being limited to the surface; and (5) that in no event should a receiver be appointed. The complainant filed a general replication.

It was established on the hearing that the land in question, about 3,400 acres, was granted by the Mexican government to

John A. Veatch, February 6, 1835, and was owned by him at his death, April 24, 1870. He died intestate, and this land was inherited by his six children, one of whom was Andrew A. Veatch. The complainant was married to said Andrew A., January 20, 1869 and lived with him as his wife until his death, intestate, March 11, 1871, when, under the law of descent and distribution in force in Texas, an estate for life in one-third of his one-sixth interest vested in her, with remainder to their children, who were two in number. Afterwards on March 25, 1875, the complainant was married to her present husband. G. H. Snow, and they have ever since lived together as husband and wife. Prior to the year 1882 this land, which is practically all level prairie, lay out, wild and unoccupied. It was about that time inclosed in a pasture with other land by parties who paid the taxes for the use of the land until about the year 1896, when the fences were taken down and it became again uninclosed, with the exception of a few small tracts, of a few acres each, that were put into cultivation subsequent to 1896. Thus it was, nearly all lying out and unfenced, and used as commons by the public, when petroleum oil was discovered in January of the present year. The first well was on the Pelham Humphreys survey, a short distance from the line of the Veatch. Since then many wells have been sunk on the Veatch, and other are being drilled; but the present oil territory does not exceed 200 acres. That portion, however, is thick with derricks, and has upon it tanks, pipe lines, and railroad tracks, and the surface soil is impregnated with petroleum, so that agriculture, or any use, except for the production of oil, is prevented. The greater portion of the remainder of the survey is shown to be capable of cultivation and adapted to rice culture or pasturage. Affidavits were read showing that for these purposes it has a value of from $15 to $35 per acre; but it is under a lease for oil mining. The wells have been drilled, and the tanks and pipelines constructed, by the defendants, at great expense, as shown by their answers. With the exception of the complainant's interest,

they own the land held by them, respectively, deriving title by mesne conveyances from the heirs of John A. Veatch for all except the 500 acres known as the "Charles L. Cleveland Tract," and they hold that under like conveyances from Cleveland. The latter acquired title to this as against all the children and grandchildren of John A. Veatch by a compromise judgment of the district court of Jefferson county, rendered June 7, 1887, in a suit brought by them. The complainant's two children were parties plaintiff, represented by their uncle, Samuel H. Veatch, as next friend; but she was not a party. Afterwards these children executed powers of attorney to their uncle, and he conveyed their interests thereunder, accounting to them for $300 as proceeds of the sale. This was in 1891, and it seems that they gave their mother a part of the money, and it was used in support of the family. After the Cleveland judgment some of the land was platted as a town, with lots, blocks, streets, and alleys, and some lots were sold; but no evidence was offered showing that the complainant knew of this, — that is, had actual knowledge. It also appears that she never exercised any acts of ownership over the land, or asserted any claim to it, until after the oil discovery. On May 25, 1901, however, she made a written demand on each of the defendants, the Higgins Oil & Fuel Company, the J. M. Guffey Petroleum Company, the Heywood Oil Company, the Lone Star & Crescent Oil Company, and the National Oil & Pipe Line Company, to be let into joint possession, and for an accounting as to the oil taken by them, which was refused. Of these defendants only one, the J. M. Guffey Petroleum Company, states in its answer the amount or value of oil marketed. All of the defendants who have answered and are operating wells show their solvency and ability to respond to any judgment that may be obtained against them in the case. In fact, the complainant does not deny their present solvency, but makes a sworn averment as follows:

"Your orator further shows that the property of said

corporate defendants operating and that will operate wells on said land consists mainly, and in some instances solely, of the interest owned by them in said land and in said wells; that the land is of but little value, except for the oil; and if said defendants are allowed to exhaust said oil, and pay the revenue to their stockholders, many of whom reside and have their property beyond the limits of the state of Texas, as your orator fears they will do, there would be no available and adequate fund and property out of which your orator could be compensated; that said defendants operating said wells are antagonistic and hostile to your orator, and therefore cannot be relied upon to render an impartial and just account of their operations; also that the oil is taken from the wells by means exclusively within the control of the defendants, and that the complaint has no way of ascertaining and proving by disinterested testimony the amount of oil taken and marketed from time to time."

The first question presented has been frequently decided by the supreme court of Texas, where it is held that, if the complainant's title is a legal one, as in the present case, cabable of being established at law, the doctrine of laches and stale claim does not apply. It is simply a question of adverse possession. San Patricio Corp. v. Mathis, 58 Tex. 242; Moss v. Berry, 53 Tex. 632; Williams v. Conger, 49 Tex. 602; House v. Brent, 69 Tex. 30, 7 S.W. 65; Lumber Co. v. Pinckard (Tex. Civ. App.) 23 S.W. 723; Land Co. v. Hyland (Tex. Civ. App.) 28 S.W. 206. And, though sitting in equity, this court may follow the rule of decision in the state court on the question of limitation and laches. Balkham v. Iron Co., 154 U.S. 177, 14 Sup. Ct. 1010, 38 L. Ed. 953; Tioga R. Co. v. Blossburg & C. R. Co., 20 Wall. 137, 22 L. Ed. 331. Again, since the complainant could go into a court of law and establish her title, and then come to this court for the desired equitable relief, there is no reason why she should be denied it in the first instance. In cases, thus, of concurrent

jurisdiction, equity follows the law, and a court of equity will consider itself bound by the same rules that would apply in a court of law. Godden v. Kimmell, 99 U. S. 201, 25 L. Ed. 431; Metropplitan Nat. Bank v. St. Louis Dispatch Co., 149 U. S. 448, 13 Sup. Ct. 944, 37 L. Ed. 799; Reugan v. Sabin, 3 C. C. A. 578, 53 Fed. 420; 11 Am. & Eng. Enc. Law, 476.

The contention that the complainant was bound by the judgment rendered in the suit against Cleveland, when she was not a party to it, cannot be sustained. The fact that her co-tenants might have recovered for her in their names does not alter the matter. Stovall v. Carmichael, 52 Tex. 383; Walker v. Read, 59 Tex. 187; Bass v. Sevier, 58 Tex. 567; Jeffus v. Allen, 56 Tex. 195; 1 Black, Judgm. 554. Nor can it be said that she was a party by representation. Williamson v. Jones (W. Va.) 19 S.E. 444, 25 L. R. A. 222; 15 Enc. Pl. & Prac. 627.

Coming to the next point, the proof offered on the hearing fails of showing that the complainant received from the estate of Andrew A. Veatch in California any more than she was entitled to as her part thereof, so that it becomes unnecessary to say what would have been the effect if she had appropriated more than her share. But it is urged that she estopped herself from asserting her life estate when she accepted as a gift, and used a part of the money realized by her children from the sale of their interests. There is no element of estoppel in it. They had not attempted to sell her interest, or the land itself; but if they had, and she had used the money, she would not have been estopped, because she was a married woman. Johnson v. Bryan, 62 Tex. 623; Owens v. Land Co. (Tex. Civ. App.) 32 S. W. 189, 1057.

A difficult question arises in regard to the rights of a life tenant, as respects petroleum oil obtained from the land. There seems to be no decision in Texas on the point, and but very few by the federal courts: in fact, none directly in point. The statute under which the complainant acquired her dife estate appears

under the head, "Descent and Distribution," and reads as follows:

> "When any person having title to any estate of inheritance, real, personal or mixed, shall die intestate as to such estate, and shall leave a surviving husband or wife, the estate of such intestate shall descend and pass as follows: (1) If the deceased have a child or children or their descendants, the surviving husband or wife shall take one-third of the personal estate, and the balance of such personal estate shall go to the child or children of the deceased and their descendants. The surviving husband or wife shall also be entitled to an estate for life in one-third of the land of the intestate, with remainder to the child or children of the intestate and their descendants." Rev. St. Tex. art. 1689.

It is noticeable that all property is classified, and its mode of descent regulated under heads: First, "personal property," and, second, "land." The latter term is therefore employed in its most comprehensive sense, and is nomen generalissimum. A life estate is given the survivor in one-third of the land of a deceased husband or wife, in this sense necessarily, because all property of inheritance that is not land is classified as personal property, and if the mineral rights that belonged to Andrew A. Veatch by virtue of his fee simple ownership of one-sixth of this land did not pass, one-third to his widow for life, as land, it passed as personal property, one-third to her absolutely. The life estate is given, not in the surface of the land, but in the land as land, and it is elementary that the land itself in legal contemplation extends from the sky to the depths. Coke says:

> "The term 'land' includes, not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses and other buildings; and it has an indefinite extent upwards as well as downwards, so as to include everything terrestrial under or over it." Co. Litt. 4a.

Blackstone says:

"Land comprehends all things of a permanent and substantial nature, being a word of very extensive signification; also, if a man grants all his lands, he grants all his mines of metal and his fossils, his woods, his waters, and his houses, as well as his fields and meadows." 2 Bl. Comm. 16-18.

Washburn says:

"Land is always regarded as real property, and ordinarily whatever is erected or growing upon it, as well as whatever is contained within it or beneath its surface, such as minerals and the like, upon the principle that 'cujus est solum, ejus est usque ad caelam' in one direction, and 'usque ad orcum' in the other." 1 Washb. Real Prop. 3.

The American and English Encyclopedia of Law (old edition) defines it as follows:

"Land is the surface of the earth, whatever is attached to it by nature or by the hand of man, and all that is contained within or below it." Vol. 19, p. 1032.

In Koen v. Bartlett, 23 S.E. 665, 31 L.R.A. 130, 56 Am. St. Rep. 887, the court discussed this question of whether a life estate in land is a mere interest in the surface, and said:

"It must be conceded that the life tenant is vested with the ownership thereof as land, as being seised of the immediate freehold of possession, which possession extends from top to bottom, to the subsurface as much as the surface, in other words, to the land as a whole, or the tenant for life has a freehold, as well as a tenant in fee, and that the owners of the inheritance have no more right to approach by a tunnel, and break and enter his superficial close, than they have to break and enter his close on the surface."

Lenfers v. Henke (Ill.) 24 Am. Rep. 263, is to the same effect, and in that case the court said.

> "Land comprehends all things of a substantial nature, which includes all ground, soil, or earth whatever, and hath in its legal signification an indefinite extent upwards as well as downwards. Minerals are a part of the land itself, and, if not susceptible of division, the wife is entitled to be endowed of the profits and rents."

According to all the cases and text-books a life estate in land invariably extends to all minerals beneath the surface; but, the right being merely to use and enjoy, and not to dispose of, the land, the difficulty arises in determining what is proper use and enjoyment, and when a life tenant may and when he may not sever and dispose of minerals, without being guilty of waste. It is obvious that a life tenant, if allowed to mine, might get a much larger proportion of the benefit of the estate than he would ordinarily receive. On the other hand, if not allowed to mine, he might get much less. The courts have undertaken to draw the line, and it may be stated as a general rule, at common law, that, while a life tenant may continue to work mines that were open when the tenancy commenced, and this even to exhaustion, and may construct new approaches, he cannot open new mines, for to do so would be to commit waste. The rule allowing life tenants to mine, when the operations are commenced before the tenancy is created, is based on the theory that in such cases mining is a mere mode of use and enjoyment, and to extract minerals is but to take the accruing profits of the land. Raynolds v. Hanna (C.C.) 55 Fed. 801; Koen v. Bartlett, 23 S.E. 664, 31 L.R.A. 130, 56 Am. St. Rep. 884; Seager v. McCabe, 52 N.W. 299, 16 L.R.A. 247; Wentz's Appeal, 106 Pa. 301. The matter resolves itself, then, into a question of when and under what circumstances mining may be adopted as a mode of using the land. The authorities all agree that there is no restriction when the land has once been used for mining purposes before the life tenant comes in;

and they now go a step further, and hold that mining will be allowed if the owner of the preceding estate has fixed on it the character of mining land by lease or the like, though no mines were opened. Priddy v. Griffith (Ill.) 37 N.E. 999, 41 Am. St. Rep. 397; Koen v. Bartlett, supra; Seager v. McCabe, supra.

In the case at bar, the remainder-men, being also the owners of seventeen-eighteenth absolutely, have taken possession of the entire property to the exclusion of the life tenant, and have converted it into an oil field. The latter has committed no waste, and the point to be decided is, not whether she might drill for oil herself, but whether she may elect to acquiesce in the changing in the mode of use. The estates were joint when the change was made, and no partition was demanded. Consequently, any advantage that ensues must inure to the benefit of all the cotenants in proportion to their interests. Lenfers v. Henke, 73 Ill. 405, 24 Am. Rep. 263, is an applicable authority, in principle at least. The case involved two questions: (1) Whether a widow is entitled to dower in mines not open when her right of dower attached, but opened by the reversioner before assignment; and (2) whether a certain verbal agreement was valid as an assignment of dower. Both were decided in the affirmative. After announcing that the first question presented was one of first impression, the court proceeds with a review of the authorities. Speaking of the rule that a life tenant or dowress may not open new mines, the court observes:

> "In many of the later cases, as well as the earlier cases, no reason whatever is assigned for the adoption of the rule; but, where any is assigned, it is, the dowress cannot open new mines when discovered, because she would be committing waste, which she is not permitted to do. On principle, why may she not be endowed of mines opened by the heir or owner of the fee, after the dower attaches and before there has been any assignment? By all the decisions, it is not waste for her to work mines opened, although the same

had been abandoned before the death of the husband. She may construct new approaches, and not be guilty of waste. The reason for the rule adopted that bars dower in all mines not opened during the lifetime of the husband failing, the rule ought not to be extended to cases not strictly within its meaning."

And finally:

"The heir, by opening the mines has destroyed all other profits of the land. There is no mode of enjoying mines, excepting by working them. If this cannot be done, they are profitless to the dowress. As we have seen, it is not waste in her to work mines opened by her husband, and, by a parity of reasoning, we reach the conclusion it is not waste for her to work mines opened by the heirs before assignment of dower."

Priddy v. Griffith (Ill.) 37 N.E. 999, 41 Am. St. Rep. 397 was decided by the same court, and language to the same effect used.

There is a slight difference between the facts of Lenfers v. Henke and the case at bar. In that case the widow's interest was consummate dower, while here it is a vested life estate in an undivided interest. But it is not perceived how this could affect the principle involved. The reasoning of that case is applicable here, and seems unanswerable, and it is certainly in keeping with the tendency of modern decisions. Still, it recognizes the rule that a life tenant may not open new mines, and it is not in conflict with any of the cases cited by counsel for defendants, unless it be Coates v. Cheever, 1 Cow. 460. It seems to have been there held by one of the courts of New York in 1823 that the widow was not dowable of mines opened by the heir after the husband's death. The land there had been devoted to mining purposes, however, by the husband, in his lifetime, and the decision for that reason was clearly wrong. Billings v. Taylor (Mass.) 20 Am.

Dec. 533; Gaines v. Mining Co., 33 N.J. Eq. 603; Priddy v. Griffith, supra; Koen v. Bartlett, supra.

There is another well-established principle that supports the holding of Lenfers v. Henke, and it is this: As against the heir and his vendees, the widow is entitled to dower in her deceased husband's land according to value and condition at the time dower is assigned. A full discussion of this occurs in Allen v. McCoy, 8 Ham. 418. See, also, 1 Washburn, 238-240; 2 Scribner, 595; 5 Am. & Eng. Enc. Law (old) 929. The same rule applies in partition between co-tenants, except that actual improvements are allowed to the one making them, but enhancements from independent causes, such as growth in the population of a town or discovery of mineral deposits, may be shared by all.

Thus far the question has been treated without distinction between conventional life estates and common-law dower on the one hand, and life estates inherited by the law of heirship and succession on the other. In Seager v. McCabe, supra, the supreme court of Michigan, construing ad ower statute of that state, reviewed the decisions at considerable length, made the distinction, and announced the following conclusion:

> "The rules applicable to a country where landed estates are large and diversified, where the laws of inheritance are exclusive, where the theory of dower is subsistence merely, and where there is a strong disposition to free estates from even that charge, do not obtain in a commonwealth like ours, where estates are small, and the policy of our laws is to distribute them with each generation, where dower is one of the positive institutions of the state, founded in policy, and the provision of the widow is a part of the law of distribution, and the aim of the statute is, not subsistence only, but provision commensurate with the estate. In the present case the grant is by operation of the statute, giving the use of all the lands of which the husband was seised. The grant

must be held to include the use of these lands, irrespective of whether mines are opened upon them before or after the husband's death."

The statute there construed was not as broad as the one of Texas, and was directed at the subject of dower. The Texas statute makes no mention of dower, but defines that which under civil law would have been a usufruct, — an estates not impeachable for waste. This is specially significant, when it is remembered that the Texas system of land titles and laws of marital rights is devised largely from the civil law. Carroll v. Carroll, 20 Tex. 743. Under civil law the usufructuary had a right to seek for and open every kind of mines, stone and lime quarries, chalk pits, and gravel banks. 1 Dom. Civ. Law, 843; 2 Dom. Civ. Law, 945-968; Neel v. Neel, 19 Pa. 323.

Another noticeable feature of the statute is that it gives the surviving husband the same estate in the land of the wife upon her death that it gives her in his land at his demise. This is a complete answer to the argument that the rule shall depend upon whether mines are open or not at the time of the husband's death, because he, by reason of his position as the head of the family, is deemed to fix for the use of his property commensurate with the necessities of his family. I think the complainant is entitled to one-eighteenth of the oil produced, after deducting all expenses of producing and marketing. If she is not entitled to the net one-eighteenth absolutely, then she is entitled to have such net yield impounded and put at interest, the interest to be paid to her during her life, while the corpus of the fund is preserved for the remainder-men. Blakely v. Marshall (Pa.) 34 Atl. 564; Wilson v. Hughes (W. Va.) 28 S.E. 781, 39 L.R.A. 292; Bryan, Petroleum, 41; Macswinney, Mines, 65: In neither event, however, should a court of equity take from the defendants the control and management of the common property. But a special receiver, more in the nature of an auditor, will be appointed for the purpose of

taking and keeping accurate accounts of all oil marketed by the defendants, together with prices obtained and expenses incurred, and to collect, receive, and hold, subject to the orders of the court, one-eighteenth of the net amount of all oil so marketed. Ulman v. Clark (C.C.) 75 Fed. 868; Williamson v. Jones, 19 S.E. 436, 25 L.R.A. 222.

From the evidence introduced it seems at least probable that the lines of the Veatch and Humphreys surveys coincide, and that the Ingalls and Douthett surveys are invalid. This, however, would still leave the location of the line in dispute. The line fixed by the judgment in the case of Pasture Co. v. Cleveland (Tex. Civ. App) 26 S. W. 93, appears to have been acted upon as an agreed line for some years, and for the purposes of the present order it will be considered as the true line.

F. C. Proctor, Geo. C. Greer, Foster Rose, Gustave Lemle, D. Edw. Greer, A. T. Watts, and Wm. P. Ellison, for appellants.

Amos L. Beaty and R. R. Hazlewood, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. As, by the record, the appellee, Mrs. Snow, is seised of an estate for life in one undivided one-eighteenth part of the lands described in the decree appealed from, and to that extent is a tenant in common with the owners of the fee, we all agree that she is interested in and entitled to an accounting for all oil developed and produced on and from the said lands to the prejudice of her estate, and to that end a receiver was property appointed pending the litigation necessary to finally determine the full rights of the appellee. On this appeal no other questions need be passed upon.

The decree of the circuit court is affirmed, with costs.

HARRIS v. DEFENBAUGH et al.
SAME v. DEFENBAUGH.

(Supreme Court of Kansas. June 11, 1910.)

(Syllabus by the Court.)

1. JUDGMENT (§ 12*) — SERVICE BY PUBLICATION AFTER DEATH OF DEFENDANT.

In an action quieting title to lands, a judgment obtained by service of publication only is void where the action is not commenced until after the person named as defendant is dead.

[Ed. Note. — For other cases, see Judgment, Dec. Dig. § 12.*]

2. PROCESS (§ 98*) — SERVICE BY PUBLICATION ON UNKNOWN HEIRS — VALIDITY — ABSENCE OF ORDER OF COURT.

Where an attempt is made to obtain service by publication upon the unknown heirs or devisees of a defendant, under section 4512 of the General Statutes of 1901 (Code Civ. Proc. § 78), without an order of the court authorizing the same, the service is void.

[Ed. Note. — For other cases, see Process, Cent. Dig. § 121; Dec. Dig. § 98.*]

3. TAXATION (§ 734*) — BONA FIDE PURCHASER — TAX DEED HOLDER.

A tax deed holder is not without the protection of section 7988 of the General Statutes of 1901, which provides that the title of a purchaser in good faith, without knowledge of a will, derived from the heirs of any person who is not a resident here at the time of his death shall not be defeated by the production

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* For other cases see same topic and section NUMBER in Dec. Dig & Am. Dig. Key No. Series & Rep'r Indexes

of the will, unless the same shall be offered for record within two years of the final probate. In order to bring himself within its protection, he must be a purchaser in good faith, and have acquired his title from the testator, or the heirs or devisees of the testator.

[Ed. Note. — For other cases, see Taxation, Dec. Dig. § 734.*]

4. QUIETING TITLE (§ 29*) — DEFENSES — LACHES.

Laches is ordinarily no defense in an action to quiet title or remove a cloud where the plaintiff is in possession.

[Ed. Note. — For other cases, see Quieting Title, Cent. Dig. § 63; Dec. Dig. § 29.*]

5. EQUITY (§§ 67, 73*) — LACHES — NATURE OF DOCTRINE.

The doctrine of laches is founded to some extent upon the principles of equitable estoppel. Where, by reason of acquiescene or long lapse of time, there is a possible loss of testimony or increased difficulty of defense, the doctrine may be applied in the discretion of the court, but laches does not consist in mere lapse of time.

[Ed. Note. — For other cases, see Equity, Cent. Dig. §§ 191-196, 222-224; Dec. Dig. §§ 67, 73.*]

6. EQUITY (§ 84*) — LACHES — SCOPE OF REMEDY.

The doctrine of laches is never invoked in aid of a party where the equities are not in his favor.

[Ed. Note. — For other cases, see Equity, Dec. Dig. § 84.*]

7. TAXATION (§ 734*) — SALE — POSITION OF TAX DEED HOLDER.

There are no equities in favor of a tax deed holder as against the owner of land. The rights of a tax title holder are purely statutory.

[Ed. Note. — For other cases, see Taxation, Cent. Dig. § 1473; Dec. Dig. § 734.*]

8. TAXATION (§ 805*) — ATTACKING TAX TITLE — LACHES.

Laches cannot be imputed to the owner of land for failure to begin an action to annul a tax deed where the tax title holder is not in adverse possession.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.*]

9. TAXATION (§ 805*) — ATTACKING TAX TITLE — LACHES.

Where the holder of the legal title to lands brings an action to quiet his title, a defendant whose claim rests upon a defective tax deed less than five years old cannot avail himself of the defense of laches on the ground that the plaintiff failed to pay the taxes, or to file his title papers for record, or to assert his ownership of the lands by taking actual possession, until after the defendant acquired his rights.

[Ed. Note. — For other cases, see Taxation, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.*]

Appeal from District Court, Kearny County; Wm. H. Thompson, Judge.

Separate actions by J. M. Harris against Harvey Defenbaugh and others and against Harvey Defenbaugh. Judgments for defendants, and plaintiff appeals. Reversed and remanded.

J. M. Harris, for appellant. Arthur H. Shay, for appellees.

PORTER, J. The plaintiff brought separate actions to quiet title to two quarter sections of land in Kearny county. The court found generally for the defendant, and the plaintiff appeals. The cases being alike on the facts, they were consolidated in this court and submitted together.

There is no controversy as to the facts. Mansfield Young and

Ruth E. Harris entered upon the lands in 1892 and proved up on the same. In that year patents were issued, one to Mansfield Young and the other to Ruth E. Harris. In 1896 they sold the improvements, leaving the lands vacant and unoccupied, and moved to Illinois, where they were married. Shortly thereafter Mansfield Young died, leaving a will wherein he devised all his property to his wife. In 1898 the wife died leaving a will wherein all her property was devised to her sister and seven brothers, one of whom is the plaintiff, who afterwards purchased the interests of the other devisees. The wills of Mansfield Young and Ruth E. Young were duly probated in Will county, Ill., and on the 16th day of October, 1907, certified copies thereof were duly recorded in Kearny county, Kan. The lands at that time were still vacant and unoccupied. The plaintiff, after filing his deeds and copies of the wills for record, paid the taxes on the lands for 1907, and on October 22, 1907, went upon the lands and rented the same by written lease to one Morgan, a stock raiser, who has since used the lands for grazing purposes. The plaintiff immediately thereafter brought these actions to quiet his title.

The defendant claims title through a warranty deed from one J. H. Robinson, who held a conveyance from F. C. Puckett, a tax deed holder. Puckett claimed his tax deed in 1903, and shortly thereafter commenced a suit to quiet his title, making Mansfield Young and his unknown heirs and Mrs. Mansfield Young and Ruth E. Harris parties defendant. At the time he brought his action, both Mansfield Young and Ruth E. Young were dead. He attempted to obtain service by publication, and on the 23rd day of June, 1903, a decree was rendered quieting his title. He afterwards conveyed to Robinson, and Robinson to the defendant, Defenbaugh. The defendant in his answer set up the Puckett tax deed and the Puckett judgment. At the time these actions were brought the tax deed was less than five years old and defective on its face, for the reason that it purported to convey a large number of disconnected tracts of land and failed to state

the amount for which each separate tract was conveyed. Gibson v. Kueffer, 69 Kan. 534, 77 Pac. 282; Worden v. Cole, 74 Kan. 226, 86 Pac. 464; Smith et al. v. U. S. Sugar & Land Co. et al. (just decided) 108 Pac. 860. The judgment quieting title in Puckett was void for want of jurisdiction. Mansfield Young and Ruth E. Young were both dead. No effort was made to obtain service upon the unknown heirs and devisees of the wife, but an attempt was made to obtain service upon the unknown heirs and devisees of Mansfield Young. The attempted service, however, was void for the reason that no order was made authorizing publication upon such unknown heirs or devisees, as required by section 4512 of the General Statutes of 1901 (Code Civ. Proc. § 78), then in force.

In his answer the defendant also claimed that the plaintiff could not recover because copies of the wills of Mansfield Young and Ruth E. Young were not filed for record in Kearny county until after the defendant had acquired his title. This defense is based upon section 7988 of the General Statutes of 1901, which provides that the title of a purchaser in good faith without knowledge of a will derived from the heirs of any person not a resident here at the time of his or her death shall not be defeated by the production of the will, unless the same shall be offered for record in this state within two years of the final probate. This statute, however, cannot avail the defendant. In order to bring himself within its protection, he must be a purchaser in good faith (Markly v. Kramer, 66 Kan. 664, 666, 72 Pac. 221), and must have acquired his title from the heirs of the testator. He does not claim privity with the makers of the wills, but claims title by being a purchaser in good faith, relying upon the Puckett judgment and tax deed.

The main contention of the defendant, and the proposition upon which the court apparently decided the issues in his favor, is that the plaintiff lost his rights to the land by his laches in

failing to assert his title sooner. The answer is not set out in full in the abstract, but from the argument in the briefs the contention appears to be that the plaintiff is guily of laches in failing to pay the taxes upon the land and neglecting to file for record his conveyances and copies of the wills. We confess our inability to discover how the defense of laches could be held to apply to the facts in this case. In the first place, laches is ordinarily no defense in an action to quiet title or to remove a cloud where the plaintiff is in possession. 32 Cyc. 1845; Ruckman v. Cory, 129 U. S. 387, 9 Sup. Ct. 316;[1] Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959; Beck Lumber Co. v. Rupp, 188 Ill. 562, 59 N. E. 429, 80 Am. St. Rep. 190; Hyde v. Redding, 74 Cal. 493, 16 Pac. 380. In the latter case it is said: "And, where a plaintiff has been in possession of land, he cannot be guilty of laches in the bringing of a suit to remove a cloud at any time before an action has been brought to distribute his possession or to deprive him of any enjoyment of his right. Liebrand v. Otto, 56 Cal. 248." See, also, Hogg's Equity Principles, § 299. There are also many decisions to the effect that, where the title of a complainant to real estate upon which he bases his right to equity is a legal one capable of being established at law, the doctrine of laches and stale claim does not apply, but his rights are barred only by adverse possession, and in such cases on general principles equity will follow the law on the question of the statute of limitations. Higgins Oil & Fuel Co. v. Snow, 113 Fed. 433, 51 C. C. A. 267; Penrose v. Doherty, 70 Ark. 256, 67 S. W. 398; Moss v. Berry, 53 Tex. 632; Williams v. Conger, 49 Tex. 582. In the latter case it is said: "But we know of no authority to warrant the court in holding that the mere failure to pay taxes, or the laches or delay of the owner in bringing suit for the recovery of land to which he has a legal title, will defeat his action, where there has not been actual adverse possession for a sufficient length of time to support plea of limitation."

[1] 32 L. Ed. 728.

But we need not rest our decision upon these grounds. The doctrine of laches is founded to some extent at least upon the principles of equitable estoppel. Where, by reason of acquiescence and long lapse of time, there is a possible loss of testimony or increased difficulty of defense, the doctrine may be applied in the discretion of the court, but laches does not consist in the mere lapse of time. 19 A. & E. Enc. of Law, 149. In Galliher v. Cadwell, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738, it is said: "Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced — an inequity founded upon some change in the condition or relations of the property or the parties." (Syllabus.) In the present case no neglect or delay of the plaintiff nor of his predecessors in title could have caused any prejudice to the defendant or have altered his condition. The defendant took his conveyance, not in reliance upon the alleged abandonment of the owners, but upon the strength of the tax deed and the judgment purporting to quiet title in Puckett. How, then, can it be said that the failure of the plaintiff to file for record copies of the wills and the conveyances under which he derives his title has affected the defendant's ability to make defense? The claim of title of the defendant is not derived in any way from the testators of the wills or the grantors in the plaintiff's deeds. A large number of cases are cited where laches is held to be a defense, but they all proceed upon the theory that not mere delay, but delay that works a disadvantage to others, must be shown before the doctrine can be invoked. Cases holding that, where the plaintiff had slept on his rights and permitted the defendant to make valuable improvements on the property or to make large expenditures on reliance of his title, he will be barred by laches, have no application to the facts here. The lands were vacant and unoccupied until the plaintiff took possession. Not a dollar has been laid out in improvements or expended by the defendant in reliance upon the plaintiff's attitude, and the defendant is in no position to invoke

the doctrine of laches because of any change or alteration in his condition. Moreover, the doctrine of laches is never invoked in aid of a party where the equities are not in his favor. There are no equities in favor of a tax deed holder as against an owner of land. His rights are purely statutory. There are therefore no equities in favor of the defendant. The judgment under which he claims is void for want of jurisriction, and his title depends solely upon the tax deed. The latter, being less than five years old and defective on its face, carried with it no constructive possession of the lands, and started no statute of limitations running against the owner. Taylor v. Miles, 5 Kan. 498, 7 Am. Rep. 558; Paine v. Spratley, 5 Kan. 525; Hall's Heirs v. Dodge, 18 Kan. 277. How, then, could a court of equity hold the owner bound by acquiescence predicated upon mere lapse of time, or for failure to record his title papers, or take actual possession of the land, or for any or all the reasons suggested? The statute gives the owner five years from the recording of a tax deed within which to contest its validity where it is valid upon its face; and where it is void on its face, and the tax title holder is not in actual possession, no statute of limitations runs against an action to annul it. Laches is never imputable to the owner of land for failure to begin an action to annul a tax deed where the tax title holder is not in adverse possession. Cook v. Lasher, 73 Fed. 701, 19 C. C. A. 654; State v. Sponaugle et al., 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727; United States v. Insley, 130 U. S. 263, 9 Sup. Ct. 485, 32 L. Ed. 968. To say to the owner of vacant, unoccupied land that an action brought to quiet his title within the statutory period of five years against one claiming under a tax deed is barred because the claim is stale in carrying the doctrine of laches further than any of the decided cases of which we are aware.

In Arizona, by statute, the scope of an action to quiet title is enlarged so as to permit a plaintiff to maintain it who is out of possession. Compare the facts in the present case upon which the claim of laches is based with those in Costello v. Muheim, 9 Ariz.

422, 84 Pac. 906, where the defense was interposed, and where the court used this language: "Furthermore, we concur with the appellant's contention that the facts, as they appear in this record, do not show him to be guilty of laches. To hold, in an action to quiet title, that the plaintiff may not recover against a defendant who has been in possession for less than three years, for no other reason than that the plaintiff has failed to pay his taxes, or list his property for taxation, for a period of 11 years, while the defendant, holding a void tax deed to the property, has paid the taxes during the 11 years, and has within three years expended $780 in improvements, extends the doctrine of laches to a degree not supported by any precedent cited to us. We are unwilling so to extend it. Plaintiff is not precluded by laches from maintaining his suit, unless by reason of his course defendant has been misled to his injury, or the property has, at defendant's risk and expense, been greatly enhanced in value while plaintiff lay by awaiting the turn of events to assert his claim, or unless some other facts exist, not now disclosed in this record, showing inequity in the plaintiff's position." The doctrine that one who has affirmatively by words and conduct assented to the claims of another is guilty of laches has no application to this case because there were no circumstances which required the plaintiff to assert his rights. The rule is thus stated in 16 Cyc. 159: "But acquiescence of plaintiff in a conflicting claim cannot be inferred by the court where no circumstances appear which call upon plaintiff for assertion of his rights."

No law required the plaintiff to record his deeds or to file for records certified copies of the wills under which he claims. So long as there was no innocent purchaser who derived his title from the heirs of the testators or from the testators themselves, the failure to file for record copies of the wills could prejudice no one; nor was the owner guilty of any laches in failing to take possession of the lands. The owner of land may use it as he sees fit. He may take it into his actual possession, or, if it suit his pur-

poses better to leave it unoccupied and vacant, he can do so without danger thereby of losing his title, unless some person obtains possession and retains it adversely for a length of time sufficient to bar the owner's rights. Nor is the owner under any obligation to record his title papers. The recording acts protect the rights of innocent purchasers. To the holder of a tax title whether valid or invalid the owner owes no duty to record his title papers, nor to assert his claims, nor to acknowledge ownership by taking the land into his actual possession. In Hunter et al. v. Hodgson et al. (Tex. Civ. App.) 95 S. W. 637, it was held that parties claiming under a void tax deed could not avail themselves of the defense of laches and stale demand as against the holder of the legal title upon facts very similar to those in the present case. The case was decided by the Texas Civil Court of Appeals, and the Supreme Court refused to allow an appeal. It was held in that case that: "The rights of one having the legal title to land not in the adverse possession of another is not affected by his mere nonclaim for many years, or failure to pay taxes, or the payment of taxes by another claiming under a void deed, though these facts suggest that the parties may have supposed that the deed disposed of the property." (Syllabus.) Upon the facts, the plaintiff was entitled to judgment quieting his title against the claims of the defendant except a lien for taxes.

The judgment will be reversed and the cause demanded for further proceedings in accordance herewith. All the Justices concurring.

APPENDIX C

UNITED STATES COURT OF APPEALS
Tenth Circuit

March Term, 1966.

No. 8305

PERPETUAL ROYALTY CORPORATION;
UNITED ROYALTY CORPORATION;
ABERDEEN OIL COMPANY, INC.,
Appellants,

vs.

SARAH KIPFER; WARD A. McGINNIS;
CITIES SERVICE OIL COMPANY,
Appellees.

Appeal from the United States District Court
for the District of Kansas

Coleman Hayes (Hyde, Freeman & Hyde; A. K. Little; and Dale B. Stinson, Jr. were with him on the brief) for Appellants.

George C. Spradling (Carl C. Chase; Lilleston, Spradling, Gott, Stallwitz & Hope; E. E. Pedroja; Foulston, Hook & Gerety on the brief) for Appellees.

Before MURRAH, Chief Judge, and LEWIS and BREITENSTEIN, Circuit Judges.

PER CURIAM.

This is a diversity jurisdiction action wherein plaintiffs-appellants sought to establish claim to certain mineral rights in producing oil properties located in Kansas and for an accounting

from defendants-appellees of some $852,000 received as rolayties during the eight years preceding institution of the action. The cause was submitted to the trial court upon an agreed statement of facts and resulted in a holding by that court that appellants' claims were barred by the equitable principles of laches. We hold that the trial court could and did properly apply the bar of laches to appellants' claims under applicable Kansas law and under the totality of the facts and circumstances as set forth in that court's memorandum opinion, 253 F. Supp. 571, and affirm the judgment for the reasons therein stated.